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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**SOUTHERN DIVISION**

IN RE: TOYOTA MOTOR CORP.  
UNINTENDED ACCELERATION  
MARKETING, SALES PRACTICES,  
AND PRODUCTS LIABILITY  
LITIGATION

Case No. 8:10ML2151 JVS (FMOx)

**FOREIGN ECONOMIC LOSS  
PLAINTIFFS' OFFER OF PROOF  
IN RESPONSE TO COURT'S  
ORDER GRANTING MOTIONS  
TO DISMISS**

\_\_\_\_\_  
This Document Relates To:

**FOREIGN ECONOMIC LOSS  
PLAINTIFFS**

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1 **I. INTRODUCTION**

2 Pursuant to this Court's directive,<sup>1</sup> the Foreign Economic Loss Plaintiffs  
3 provide this "Offer of Proof" respectfully responding to the issues raised by this  
4 Court in its Order Granting Defendants' Motions to Dismiss the Amended  
5 Consolidated Foreign Plaintiffs' Complaint ("ACFPC") on April 8, 2011.  
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7 As the Court is aware, this action arises out of Foreign Plaintiffs' purchase of  
8 certain vehicles designed, marketed and sold by Defendant Toyota Motor  
9 Corporation ("TMC"). These vehicles will be specifically identified in the  
10 anticipated Foreign Economic Loss Plaintiffs' Second Amended Complaint  
11 (hereinafter referred to as the "FELPSAC") (to be filed on June 7, 2011 pursuant to  
12 the leave to re-plead granted by this Court in its April 8, 2011 Order) and consist of  
13 only Toyota-brand vehicles<sup>2</sup> (hereinafter "**Toyota Subject Vehicles**").<sup>3</sup>  
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18 <sup>1</sup> "[W]ithin 20 days of the entry of this Order, Plaintiffs shall file an offer of proof as  
19 to the following issues:

- 20 • How Plaintiffs would resolve the current joinder pleading defects;  
21 • How Plaintiffs would tie the actions of the U.S. Toyota Defendants and TMC to  
22 any manufacturing claim in the various countries where the vehicles were  
23 manufactured; and  
24 • How, in light of the foregoing requirement regarding manufacturing claim(s),  
25 Plaintiffs plan to replead claims against TEMA."

26 April 8, 2011 Order [Dkt. No. 1237] at 65.

27 <sup>2</sup> Toyota Subject Vehicles include only Toyota brand vehicles, such as the Camry,  
28 Corolla, RAV4, Tacoma, Auris, Altis and Yaris models purchased (or leased) by  
certain Foreign Plaintiffs. The FELPSAC likely will exclude Lexus and Scion brand  
vehicles.

<sup>3</sup> Throughout this Offer of Proof, Foreign Plaintiffs make reference to a number  
of anticipated material changes in their forthcoming FELPSAC, which changes

1 Foreign Plaintiffs intend to pursue claims against Toyota a/k/a TMC for the  
2 harm caused to them by reason of their acquisitions of Toyota Subject Vehicles.  
3 While Toyota is a multi-national corporation, with business operations through  
4 subsidiaries in various countries throughout the world, including the United States,  
5 the company that caused the harm to the Foreign Plaintiffs is Toyota/TMC. There is  
6 no question Foreign Plaintiffs have rights against Toyota/TMC.  
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9 TMC's North American-based subsidiary, Toyota Motor North America, Inc.  
10 ("TMA"), is a holding company responsible for, *inter alia*, TMC's North American-  
11 based design and marketing operations. These functions are conducted through two  
12 (2) companies, both of whom have been sued by Foreign Plaintiffs: (1) Toyota  
13 Motor Engineering and Manufacturing North America, Inc. ("TEMA") and (2)  
14 Toyota Motor Sales, U.S.A., Inc. ("TMS"). As discussed more fully below (and as  
15 will be discussed in great detail in the anticipated FELPSAC), TEMA is principally  
16 responsible for implementing TMC's design decisions encapsulated in, "the Toyota  
17 Way", (including, *inter alia*, its defective design decisions concerning the electronic  
18 throttle control system ("ETCS" or "ETCS-i")) in the Subject Toyota Vehicles  
19 manufactured in North America (and then exported to other countries). TMS,  
20 likewise, is principally responsible for implementing TMC's core marketing and sale  
21 message, "Made by TOYOTA", (including TMC's misrepresentations about the  
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27 respond directly to this Court's concerns raised in its April 8, 2011 Order. For ease  
28 of reference by this Court, these changes are highlighted in **boldface** text.

1 purported safety of its Subject Toyota Vehicles) throughout North America. As the  
2 FELPSAC will demonstrate, that message was disseminated and received throughout  
3 the world, including to the countries where Foreign Plaintiffs reside and purchased  
4 their Subject Toyota Vehicles.  
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6 To be clear, **Foreign Plaintiffs intend to pursue claims in their FELPSAC**  
7 **against TMC, TMA, TEMA and TMS only (collectively referred to herein as**  
8 **the “Toyota Defendants”).**<sup>4</sup> Foreign Plaintiffs also intend to pursue claims  
9 **against these Toyota Defendants only for causes of action this Court did not**  
10 **dismiss with prejudice and which relate to Foreign Plaintiffs’ theories of**  
11 **liability for design defect and improper marketing**<sup>5</sup>: violations of RICO, 18  
12 **U.S.C. § 1962(c), consumer fraud (CLRA and UCL), fraudulent concealment,**  
13 **negligence, and design defect products liability.**<sup>6</sup>  
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20 <sup>4</sup> To the extent Foreign Plaintiffs currently maintain any claims against  
21 **Defendant Toyota Motor Credit Corporation (“TMCC”)** in the wake of the  
22 Court’s April 8, 2011 Order, such claims **will be dropped from the FELPSAC.** See  
23 April 8, 2011 Order at 3,17, 64 (dismissing all claims against TMCC with prejudice).

24 <sup>5</sup> See April 4, 2011 Hrg. Tr. at 11:23-12:1 (Ms. Gilford: “So by our analysis, that  
25 leaves Counts 1 through 3 and 10 through 12, 25 which arise under RICO, CLRA,  
26 UCL, fraudulent concealment, negligence, and a design defect products liability  
27 theory.”)

28 <sup>6</sup> To the extent Foreign Plaintiffs maintain **any claims for contract or warranty**  
**(relating to theories of manufacturing defect), or unjust enrichment,** in the wake  
of the Court’s April 8, 2011 Order, such claims **will be dropped from the**  
**FELPSAC.** See April 8, 2011 Order at 64-65 (dismissing claims).

1 Although the Court has granted leave to re-plead to Foreign Plaintiffs,<sup>7</sup> the  
2 Court also accepted the suggestion of Toyota at the April 4, 2011 hearing that certain  
3 issues should be subject to a preliminary offer of proof. Without waiving any  
4 objections Foreign Plaintiffs may have to the procedural irregularity of providing  
5 such a preliminary “offer of proof” in advance of their submission of a formal  
6 pleading, but in the interest of assisting this Court in understanding Foreign  
7 Plaintiffs’ amended claims (in the context of the overall MDL proceeding), Foreign  
8 Plaintiffs make this offer of proof to address the particular issues raised by the Court.  
9 These questions will be answered fully in the FELPSAC, and subsequent briefing  
10 thereon.  
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## 14 **II. OFFER OF PROOF**

### 15 **A. Foreign Plaintiffs Will Resolve the Current Joinder Pleading** 16 **Defendants in Their FELPSAC.**

17 The Court’s concerns about joinder appear to center upon Toyota’s claim of  
18 failure to join alleged indispensable parties as required by Rule 19. April 8, 2010  
19 Order at 17, *et. seq.* Toyota’s Motion to Dismiss claimed specifically that “the  
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22 <sup>7</sup> The Court’s decision in this regard was consistent with prevailing case law that  
23 permits parties leave to re-plead in cases, as here, where such re-pleading will not be  
24 futile. *See Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671 (9<sup>th</sup> Cir. 1981)  
25 (holding that a court should adopt less drastic alternatives, such as allowing leave to  
26 amend a complaint, as opposed to dismissal with prejudice); *see also, McHenry v.*  
27 *Renne*, 84 F.3d 1172 (9<sup>th</sup> Cir. 1996) (holding that plaintiffs should first be permitted  
28 to replead when it would not be considered futile by the court); *Anglo California*  
*National Bank of San Francisco v. Lazard*, 106 F.2d 693 (9<sup>th</sup> Cir. 1939) (holding it  
was not error for district court to allow appellees leave to amend their complaint to  
conform to the proof).

1 complaint must be dismissed for failure to join necessary defendants who actually  
2 manufactured, distributed and sold the plaintiffs' vehicles...". Dkt. No. 663-1 at 2.  
3 Toyota's argument then proceeds to urge that the Foreign Plaintiffs' complaint  
4 should be dismissed in its entirety and with prejudice because "Foreign Plaintiffs do  
5 not properly allege facts showing that each of their vehicles was manufactured in the  
6 U.S. by any U.S. Defendant. *Id.* at 10 (citing VIN numbers for some, but not all, of  
7 Foreign Plaintiffs' vehicles); *see also*, April 8, 2011 Order at 20 (noting that "Toyota  
8 argues that the foreign entities who manufactured, distributed, advertised, repaired,  
9 sold and/or leased Plaintiffs' vehicles must be joined as necessary parties.")

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12 In so arguing, Toyota misapprehends the nature of the Foreign Plaintiffs'  
13 complaint against it: **Foreign Plaintiffs allege Toyota is liable for design defect,**  
14 **not manufacturing defect**, as well as unfair and deceptive advertising about product  
15 safety and performance. Respectfully, *where* any Subject Toyota Vehicle was  
16 assembled should be deemed irrelevant to such claims by Foreign Plaintiffs.  
17 Moreover, *by whom* such Subject Toyota Vehicles were manufactured also should  
18 be deemed irrelevant to such claims.  
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22 Foreign Plaintiffs allege, like their U.S.-based counterpart plaintiffs, that  
23 Toyota/TMC defectively designed their vehicles, and that the subsidiary  
24 manufacturers simply followed the defective design created by TMC.<sup>8</sup> There is no  
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27 <sup>8</sup> Again, to the extent the Foreign Plaintiffs' prior pleading was deficient in this  
28 regard, the FELPSAC will cure any such deficiency.



1 question that TMC controls such design decisions, and therefore it should be held  
2 liable for such decisions.<sup>9</sup> See Letter dated April 12, 2011 from Lisa M. Gilford at  
3 Ex. “D” hereto (“Gilford Letter”). (“The deposition testimony given in Phase 1  
4 further indicates that the Domestic Toyota Entities...are not responsible for design,  
5 manufacturing or supply of the components involved in this case. Young Dep.,  
6 65:19-23 (“My understanding, accelerator pedals, TMC or Toyota Motor  
7 Corporation Japan, their design division, provides [the request for design and  
8 development proposal] and the standards.”).

11 Toyota’s myopic focus upon the situs of manufacture and the particular  
12 Toyota subsidiary that manufactured any particular vehicle model is misplaced; it is  
13 a red herring that should not distract this Court from the core issue concerning  
14 Foreign Plaintiffs’ claims, **Foreign Plaintiffs’ “proffer” makes clear that they do**  
15 **not intend to pursue any causes of actions for improper manufacture,**  
16 **distribution or repair.** To underscore this point, Foreign Plaintiffs note that the  
17 “domestic” plaintiffs have sued no Toyota manufacturing entity whatsoever, despite  
18 the fact that several of the vehicle models included within their complaint were  
19 manufactured *outside of the United States*. Attached hereto as Exhibit “A” is a  
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24 <sup>9</sup> For example, this Court has cited Field Technician Reports from 2006-2010  
25 involving the Toyota Camry wherein technicians in Hong Kong “confirmed UA  
26 events” and complained directly to TMC, “strongly urg(ing) TMC to investigate  
27 since the problem was highly dangerous and the incidents were stacking up...”.  
28 April 8, 2011 Order at 12-13. This Court also has observed explicitly that the  
responsibility for design “falls to TMC, the parent corporation.” *Id.* at 21.

1 printout from Toyota's website listing Toyota's worldwide manufacturing  
2 operations, consisting of "51 overseas manufacturing companies in 26 countries and  
3 regions." U.S. plaintiffs have sued none of these entities, even though at least 5  
4 Toyota vehicle models sold in the United States are actually manufactured outside  
5 the United States. *See* Ex. "A" at 2 (listing Canada-based "Toyota Manufacturing  
6 Canada, Inc." ["TMMC"] as the manufacturer since 1988 of Corolla, Matrix, RX350  
7 and RAV4 models) and listing Mexico-based "Toyota Motor Manufacturing de Baja  
8 California, S. de R.L. de C.V." ("TMMBC") as the manufacturer since September  
9 2004 of the Tacoma model trucks sold in North America).

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13 In other words, Foreign Plaintiffs who reside in Mexico and bought Tacoma  
14 trucks – which were manufactured and sold in Mexico – would not be part of the  
15 case brought by "domestic" economic loss Plaintiffs. Cf. April 8, 2011 Order at 21,  
16 m. 14 (noting that "[t]o the extent vehicles owned by putative members of the  
17 foreign class were manufactured in the United States...these Plaintiffs fall into the  
18 definition of the putative class set forth by the 'domestic' economic loss Plaintiffs.  
19 The same is true for Foreign Plaintiffs who reside in Canada and purchased Corolla,  
20 Matrix, RX 350 and RAV4 vehicles – which were manufactured and sold in  
21 Canada.<sup>10</sup>

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27 <sup>10</sup> Foreign Plaintiffs' FELPSAC will seek to add in appropriate representatives  
28 from Canada who assert such Canadian claims.

1 If the manufacturers of Subject Toyota Vehicles were truly “indispensible  
2 parties” to this lawsuit, one would expect this Court would have required the  
3 domestic plaintiffs to sue the domestic Toyota manufacturing subsidiaries, and other  
4 companies not affiliated with Toyota, like Subaru, Toyota’s contract partner for the  
5 manufacture of Camry vehicles. Camrys are at the heart of all plaintiffs complaints  
6 in this MDL, and yet domestic plaintiffs have not named Subaru. Since 2007, TMC  
7 has contracted with Subaru for the manufacture of hundreds of thousands of  
8 allegedly defective Camry vehicles at a Subaru plant in Indiana owned by Subaru of  
9 Indiana Automotive, Inc. (SIA). *See* Ex. “A” at 3. If the manufacturer of a Toyota  
10 vehicle is truly an indispensable party, it is an indispensable party for all plaintiffs,  
11 and the Subaru-manufactured Camry plaintiffs should be dismissed (according to  
12 Toyota’s logic).

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17 Of course, Foreign Plaintiffs do not contend that the claims of any of these  
18 plaintiffs should be dismissed. Instead, the point is, and will be in the context of  
19 their anticipated FELPSAC (which will continue to not name any manufacturing  
20 subsidiary of Toyota or any other company), whoever manufactured an allegedly  
21 defective Subject Toyota Vehicle did so pursuant to a design created and provided by  
22 TMC pursuant to “The Toyota Way.” *See Exhibit “B”* (printout from Toyota’s  
23 website describing Globalizing and Localizing Manufacturing).

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26 “The Toyota Way” is manifested in Toyota’s consistent moniker “Made by  
27 Toyota.” *See* Ex. “B” hereto. While Toyota sought to globalize the production of its  
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1 vehicles over the years, TMC has always maintained control over design and quality  
2 assurance. As TMC's website touts, "[n]o matter where Toyota vehicles are made,  
3 they must have the same high level of quality" as any vehicle made in Japan. *Id.*  
4 TMC does not put the label "Made in the USA" or "Made in Japan" on its products;  
5 instead, it "opts for one label for all, 'Made by Toyota'". *Id.*

7 Globalization of "The Toyota Way" was further achieved by TMC  
8 "spread(ing) the 'Toyota Way' ... by educating people." *Id.* TMC accomplished  
9 this by creating the Global Production Center (GPC) in 2003. The GPC is located in  
10 Toyota City, Japan. *Id.* The GPC establishes "best practices" to be implemented in  
11 the production of all Toyota vehicles worldwide. The GPC promulgates these "best  
12 practices" for all manufacturing entities. *See* "Role of the Global Production Center  
13 (GPC) fostering globally capable personnel" at Ex. "C" hereto. As the TMC website  
14 explains,  
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18 [One] purpose of the GPC is teaching plant personnel how to prepare for the  
19 production of redesigned and different vehicle models. Traditionally, when  
20 production switched to a new model, a number of employees from Japan  
21 would be dispatched to overseas bases. *Now, members from all of the*  
22 *overseas affiliates gather at the GPC to refine the design drawings and*  
*confirm feasibility of implementation.*

23 *Id.* (Emphasis added)

24 The Subject Toyota Vehicle designs were created by TMC and provided by  
25 TMC to all fabricators, regardless of whether the manufacturers were owned by  
26 Toyota or not. TMC's counsel concedes as much. *See* Ex. "D" hereto (Letter dated  
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1 April 12, 2011 from Lisa M. Gilford) (“Gilford Letter”).<sup>11</sup> Importantly, Foreign  
2 Plaintiffs do not allege that any particular manufacturer was negligent in failing to  
3 follow the TMC design or GPC education about design for any Subject Toyota  
4 Vehicle; to the contrary, Foreign Plaintiffs allege (and will in the FELPSAC) that all  
5 relevant manufacturers simply followed The Toyota Way, and properly implemented  
6 the design specifications and training provided by TMC, either directly or by and  
7 through TMC’s wholly-owned subsidiaries, such as TMA and/or TEMA.<sup>12</sup>  
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9 Consequently, the manufacturer should be deemed irrelevant to Foreign Plaintiffs’  
10 theory of liability, instead of being deemed an “indispensible party”, as Toyota  
11 contends.  
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14 In reviewing the record, and finding it “clear that the U.S. Toyota Defendants  
15 did not manufacture or distribute Plaintiffs’ foreign vehicles”, April 8, 2011 Order at  
16 20-21, the Court found it “telling” that Foreign Plaintiffs had not “allege(d) that any  
17 of the named Toyota entities manufactured, distributed, and/or sold (or leased) their  
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20 <sup>11</sup> The Gilford Letter explains that TMC is responsible for the design of the  
21 Subject Toyota Vehicles, including, most importantly, the ETCS. *Id.* at 3  
22 (“Testimony provided by Fed.R.Civ.Proc. 30(b)(6) witnesses for the Toyota  
23 Defendants also indicates that the electronic throttle control system (‘ETCS’) and  
brake override systems *were developed in Japan by divisions of TMC.*”)(Emphasis  
added)

24 <sup>12</sup> Foreign Plaintiffs are cognizant of this Court’s many quotations from their  
25 prior pleading asserting, *inter alia*, claims against Toyota for the “manufacture,  
26 design, distribution, sale and lease of tens of millions of vehicles, or parts thereof,”  
27 throughout the United States and the world. April 8, 2011 Order at 19. Any  
28 allegations about improper “manufacture, distribution, sale or lease” – to the extent  
they do not relate to the core claims of design defect and misrepresentations and/or  
deception in marketing and advertising – will not be included in the FELPSAC.

1 vehicles.” *Id.* at 21. The Court found that “complete relief” could not be afforded in  
2 the absence of either naming the manufacturing subsidiary of Toyota, or alleging that  
3 the named Defendants were liable for the manufacture of the Subject Toyota  
4 Vehicles. *Id.* However, in so ruling, the Court appears to have been compelled by  
5 the Foreign Plaintiffs’ allegations about manufacture, distribution, sale and repair, as  
6 they pertained to Foreign Plaintiffs’ causes of action “implicating the manufacturer  
7 and designer”. *Id.* (citing as examples Foreign Plaintiffs’ claims based upon product  
8 liability for manufacturing defect and contract, both of which will be excised from  
9 the FELPSAC). Consequently, Foreign Plaintiffs respectfully submit that there is no  
10 proper record currently before this Court to adjudge the merits of the anticipated  
11 claims in the FELPSAC, in advance of such filing. Indeed, two further points should  
12 make this clear to the Court at this juncture.

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17 First, in ruling that the vehicle manufacturers were “necessary parties” to  
18 Foreign Plaintiffs’ causes of action, the Court observed that the determination of  
19 whether a party is “necessary” hinges on, among other things, “whether the conduct  
20 complained of was solely that of the parent company, TMC, and the other named  
21 Toyota entities.” *Id.* at 20. The Court cited the case of *Dernick v. Bralorne Res.*  
22 *Ltd.*, 639 F.2d 196 (5<sup>th</sup> cir. 1981) as relevant precedent. Importantly, the *Dernick*  
23 case held that, where the parent company is the principal actor, the subsidiary  
24 company is not necessary and indispensable. 639 F.2d at 199. This decision stands  
25 for the proposition that the absence from this lawsuit of TMC’s manufacturing  
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1 subsidiary companies would not impair Foreign Plaintiffs' rights to obtain "complete  
2 relief" against TMC, given that Foreign Plaintiffs assert no claim for manufacturing  
3 defect. Moreover, there has been no showing by TMC (or any other named  
4 defendant) that its right to contribution or indemnity would be diminished in any  
5 respect. *See Heinrich v. Goodyear Tire and Rubber Co.*, 532 F.Supp. 1348, 1359  
6 (D.Md. 1982).  
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9 Here, Foreign Plaintiffs allege (and will in their FELPSAC) that the unlawful  
10 conduct concerning the defective design of Subject Toyota Vehicles was solely that  
11 of TMC. Foreign Plaintiffs contend that, discovery will show that TMC provided its  
12 design specifications for certain North American manufactured vehicles through  
13 TEMA to its wholly owned subsidiary companies, like TMMC (in Canada) and  
14 TMMBC (in Mexico). This was "The Toyota Way" throughout the relevant time  
15 period. Consequently, the defect in the design of Subject Toyota Vehicles  
16 manufactured and sold in at least Canada and Mexico was caused by TMC.  
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19 If discovery were to reveal later that any particular manufacturer was  
20 somehow complicit in TMC's unlawful conduct, such parties would simply become  
21 unnamed "joint tortfeasors" with TMC in TMC's unlawful conduct. *Id.* at 1359, n.  
22 21 (holding that "it is settled that [such parties are] not per se required under Rule  
23 19", citing authorities); *see also*, April 8, 2011 Order at 22-23 ("the Court is mindful  
24 of the general rule that joint tortfeasors are permissive, rather than necessary,  
25 parties", citing *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990)). Because the  
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1 manufacturers of the Foreign Plaintiffs' vehicles are not alleged (in the FELPSAC)  
2 to have been "active participants in the allegations that are critical to the disposition  
3 of the litigation," respectfully, this criterion should not be deemed to have been met.  
4  
5 *Id.* at 23.

6 As the Court notes in the April 8, 2011 Order, the case of *Polanco v. H.B.*  
7 *Fuller Company*, 941 F. Supp. 1512 (D. Minn. 1996) is primarily a product liability  
8 action. In *Polanco*, the plaintiff sued Fuller-U.S., the parent company, for the  
9 design of glue that allegedly directly caused the death of a young Guatemalan boy  
10 who was addicted to the adhesive. However, the subsidiary, Fuller-Guatemala,  
11 physically manufactured and distributed the glue within Guatemala where the young  
12 boy lived. The distinction is that, according to the former president of Fuller  
13 Guatemala, "Fuller-Guatemala purchased the rights to market adhesives and  
14 **determined content of labeling.**" *Id.* at 1522. (Emphasis added). The court in  
15 *Polanco* therein notes that, since the subsidiary is directly involved with the very  
16 core of the case, they may well wish to ascribe responsibility to the parent and  
17 should therefore be directly represented in the case. *Id.* Furthermore, since the  
18 parent and the subsidiary will likely hold each other liable, that is, the subsidiary will  
19 blame the parent for the design, and the parent will blame the subsidiary for the  
20 content and manufacture of the glue, the subsidiary is a "necessary" party to the  
21 action. *Id.*



1 This is not the issue in the instant case: TMC concedes it controls the design  
2 of its vehicles, and Foreign Plaintiffs allege that TMC controls decisions of safety.  
3 The subsidiary manufacturers and Subaru do not change TMC's design of the  
4 vehicles or "determine the content" of the manufacture of same. TMC openly touts  
5 that the design of their vehicles is consistent throughout the world, that all of their  
6 vehicles have one label, "Made by TOYOTA," because they are manufactured from  
7 the very same design originated at TMC in accord with "the Toyota Way." See Ex.  
8 "B" and Ex. "D" at 3. Again, Foreign Plaintiffs do not intend to pursue any causes  
9 of actions for improper manufacture, distribution or repair of Toyota vehicles. This  
10 is a case about the defective design of certain vehicles, the very design controlled,  
11 admittedly, by TMC.  
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15 Furthermore, the Court in *Polanco* also notes that, "the subsidiary is not a  
16 necessary party where the facts to be proven 'against' the subsidiary are not the  
17 ultimate facts needed to make the plaintiff's case, but are merely ancillary proof of  
18 the case which lies against the parent." *Id.* (quoting, *Gay v. AVCO Financial*  
19 *Services, Inc.*, 769 F. Supp. 51, 56 (D.P.R. 1991)). The same is true in the instant  
20 case: since TMC is ultimately responsible for, and directly controlled, the defective  
21 design of the vehicles owned by the Foreign Plaintiffs, the subsidiaries are not  
22 necessary parties, as the manufacture of the vehicles is not at issue in this case.  
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1 Therefore, the subsidiaries, or unnamed manufacturers, are not “actively  
2 involved” and are not “at the heart of” this case, and need not be joined as necessary  
3 parties to this action.  
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5 Second, since the Court’s ruling, further information about the role of TMC’s  
6 in the defective design of the Foreign Plaintiffs’ vehicles has come to light,  
7 respectfully warranting this Court taking a “wait and see” approach to Foreign  
8 Plaintiffs’ anticipated FELPSAC. On the day this Court’s Order issued, TMC  
9 announced that it was “adjusting North American production due to parts availability  
10 following the March 11 Japan earthquake.” *See* Article entitled, “Toyota Adjusting  
11 North American Production” at Ex. “E” hereto. A spokesman for TEMA is quoted  
12 as saying, “[t]he situation in Japan affects many automakers and many other  
13 industries. Extraordinary efforts are underway to help suppliers recover.... *We are*  
14 *slowing down to conserve parts* yet maintain production as much as possible.” *Id.*  
15 (Emphasis added) This TMC press release has been followed by others (which will  
16 be incorporated into the FELPSAC) explaining that the slowdown in the manufacture  
17 of Toyota vehicles is occurring worldwide, demonstrating the impact TMC’s  
18 manufacture of core parts, like the ETCS and brake override systems at issue in this  
19 case. *See* Gilford Letter at 3 (Ex. “D” hereto) (conceding that TMC is responsible  
20 for the design of the defective parts at issue). This simply underscores Foreign  
21 Plaintiffs’ contention that TMC is the key defendant in this lawsuit, as the principal  
22 designer and supplier of core parts needed to construct Subject Toyota Vehicles.  
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1 This has been “The Toyota Way” throughout the relevant time period covered by this  
2 lawsuit.

3 For these reasons, it is respectfully submitted this Court should await the filing  
4 of the Foreign Plaintiffs’ FELPSAC before proceeding to address any further the  
5 matter of joinder of purportedly necessary parties.  
6

7 **B. Foreign Plaintiffs Will Tie the Actions of the U.S. Toyota Defendants**  
8 **and TMC to the Claims of Foreign Plaintiffs Who Reside in Various**  
9 **Countries.**

10 At the outset, it is important to note that, as stated above, the **Foreign**  
11 **Plaintiffs do not claim liability against any Toyota Defendant for manufacturing**  
12 **defect.**<sup>13</sup> Instead, Foreign Plaintiffs’ claims are grounded in essentially two (2)  
13 theories of liability: (1) that subject Toyota vehicles were defectively designed by  
14 TMC, the parent corporation of all three (3) U.S.-based Defendants in this lawsuit,  
15 and (2) that TMC, by and through its subsidiaries in the U.S., misrepresented the  
16 safety of the subject Toyota vehicles and deceived Foreign Plaintiffs.. In other  
17 words, Foreign Plaintiffs maintain their lawsuit against TMC. TMC is liable for both  
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22 <sup>13</sup> The Court’s April 8, 2011 Order is replete with references to the importance of  
23 the subsidiary manufacturers of Subject Toyota Vehicles, based upon Foreign  
24 Plaintiffs somewhat boilerplate allegations of improper “design, manufacture, etc.”  
25 Foreign Plaintiffs have noted this Court’s express concerns about the accuracy of  
26 their references to the various parties in their pleading – *i.e.*, “all parties (and the  
27 Court) should continue to take care to be as precise and accurate as possible” – and  
28 intend to be very precise in their FELPSAC. April 8, 2011 Order at 13-14, n.13. In  
this vein, to the extent any claim for manufacturing defect may be gleaned from any  
of the allegations of the FELPSAC once filed, such claim is hereby (and will be  
later) expressly disavowed by the Foreign Plaintiffs.

1 design defect and consumer fraud. At this juncture, Foreign Plaintiffs do not intend  
2 to pursue any other theories of liability against the parties they have sued.

3 TMC, as the ultimate parent corporation of multiple Toyota wholly-owned  
4 subsidiary companies (including TMA, TEMA, and TMS), designs and markets  
5 Toyota automobiles in North America (including Canada and Mexico, where certain  
6 Foreign Plaintiffs reside) and throughout the world (including all the other countries  
7 where the remaining Foreign Plaintiffs reside).  
8  
9

10 At all times material to this action, TMA has been a wholly-owned subsidiary  
11 of TMC. TMA is the holding company for all of TMC's North American  
12 operations, covering sales, engineering, and manufacturing subsidiaries, and  
13 overseeing functions related to government and regulatory affairs, marketing and  
14 advertising, and corporate communications. It is the Foreign Plaintiffs' belief that,  
15 TMA, in turn, has been a holding company responsible for Defendants TEMA and  
16 TMS. TEMA is responsible for engineering, design, research and development, and  
17 manufacturing activities for TMC in Canada and Mexico, in addition to the United  
18 States. In Canada, where certain Foreign Plaintiffs reside, TEMA operates the TMC  
19 subsidiary TMMC. *See* Ex. "F" hereto. In Mexico, where certain Foreign Plaintiffs  
20 reside, TEMA operates TMMBC. *Id.*  
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25 For the foregoing reasons, since Foreign Plaintiffs do not intend to assert any  
26 "manufacturing claim", they intend to focus their FELPSAC on the tie between TMC  
27 and the U.S. Toyota Defendants on their design defect and consumer fraud claims.  
28

**C. In Light of the Foregoing, Foreign Plaintiffs Plan to Re-Plead Their  
Claims Against TEMA.**

Foreign Plaintiffs again reiterate that their claims do not concern any manufacturing defect, but rather the defective design of the vehicles by TMC and the misrepresentations consistently made by TMC and its subsidiaries regarding the safety of its vehicles.

TMC, as the ultimate parent corporation of multiple Toyota wholly-owned subsidiary companies (including TMA, TEMA, and TMS), designs and markets Toyota automobiles in North America (including Canada and Mexico, where certain Foreign Plaintiffs reside) and throughout the world (including all the other countries where the remaining Foreign Plaintiffs reside). Through TMA, which is the holding company of TEMA, TMC is responsible for the defective design of the vehicle parts used to manufacture the vehicles purchased by the Foreign Plaintiffs in the various countries in which they reside.

TEMA was and is a Kentucky corporation within the United States and a resident and corporate citizen of Kentucky. TEMA, with direct guidance from TMC via TMA, is responsible for engineering, design, and research and development activities for TMC in Canada and Mexico, in addition to the United States. As part of that responsibility, TEMA operates 13 parts and vehicle manufacturing plants across North America, with a 14<sup>th</sup> plant currently under construction in Mississippi. *See* Ex. "F" hereto. Specifically, TEMA operates Canadian Autoparts Toyota, Inc.,

1 which is located in Canada, and Toyota Motor Manufacturing de Baja California, S.  
2 de R.L. de C.V., which is located in Mexico, both countries in which certain Foreign  
3 Plaintiffs reside. *Id.*

4  
5 TMC designs and develops the defective components involved in this case,  
6 which are ultimately distributed globally to manufacture its vehicles. In fact, in  
7 2001, TMC defined its values and business methods vis a vis “The Toyota Way” in  
8 order to operate as a truly global company, and to ensure common corporate culture.  
9 “The Toyota Way,” that is, universal corporate culture to ensure the same procedures  
10 throughout the world, including the countries in which the Foreign Plaintiffs reside,  
11 is the “backbone of all Toyota operations”. *See* Ex. “B” hereto. To promote sharing  
12 of “The Toyota Way,” the Toyota Institute was established in January 2002 as an  
13 internal human resources development organization. Since 2003, TMC’s overseas  
14 affiliates in the United States, Europe, Asia, Africa, and Australia have established  
15 their own human resources training organizations modeled after the Toyota Institute  
16 to ensure global, common corporate culture. *Id.*

17  
18 TMC strives for consistent design of their vehicles and to ensure that their  
19 vehicles are manufactured the same way in each country per quality assurance, also  
20 per their current website. Indeed, the electronic throttle control system (“ETCS”)  
21 and brake override systems were designed and developed in Japan by divisions of  
22 TMC. *See* Gilford Letter at 3 (Ex. “D” hereto). TMC in Japan is responsible for the  
23 design, development, engineering, and testing of the ETCS. *Id.* Those very designs  
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1 from TMC in Japan are directly brought to the United States (TEMA) and to all of  
2 TMC's subsidiaries to ensure that "The Toyota Way" is consistent universally. TMC  
3 believed so much in consistent design and manufacture of its vehicles in each and  
4 every country that it created the Global Production Center ("GPC") in Japan to pull  
5 "The Toyota Way" through one center that would "spread the word" throughout the  
6 world, including all of the countries in which the Foreign Plaintiffs reside. *See* Ex.  
7  
8 "B" hereto. The GPC was established to ensure consistent globalization and  
9 localization of TMC, including consistent design, development and production of its  
10 products, thereby also resulting in consistent defects.  
11  
12

13 The GPC, centered in Japan but carried through to TEMA and other TMC  
14 subsidiaries, is responsible for teaching plant personnel globally how to prepare for  
15 the production of redesigned and different vehicle models. Traditionally, when  
16 production switched to the design of a new model of TMC vehicle, a number of  
17 employees from Japan would be dispatched to overseas bases, including those  
18 located in Canada and Mexico, in addition to the United States. In fact, members  
19 from all of TMC's overseas affiliates gather at the GPC to refine the design drawings  
20 for vehicles and confirm feasibility of implementation. To ensure that the design and  
21 manufacture of TMC's vehicles are consistent, and to provide quality assurance  
22 across the globe, new GPC offices were built in the United States, the United  
23 Kingdom, and Thailand in 2006. *See* Ex. "C" hereto.  
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1 TMC's vehicles are all designed and manufactured consistently throughout the  
2 world and the countries in which the Foreign Plaintiffs reside, as evidenced on  
3 TMC's website which states, "Toyota doesn't put a label on vehicles which say  
4 'Made in The USA' or 'Made in Japan,' but instead opts for one label for all: 'Made  
5 by TOYOTA.' This means that there is a need to spread Toyota's manufacturing  
6 philosophy – the 'Toyota Way' – to all of their overseas bases" including the  
7 countries in which the Foreign Plaintiffs reside and which were affected by TMC's  
8 global advertising of the safety and reliability of their vehicles. TMC educates and  
9 trains its employees within its regional GPCs in the United States, the United  
10 Kingdom and Thailand to carry out corresponding activities in the North American,  
11 European, and Asia-Pacific regions.

### 12 **III. CONCLUSION**

13 For the foregoing reasons, the Foreign Economic Loss Plaintiffs respectfully  
14 request that this Honorable Court accept this Offer of Proof as a foundation to allow  
15 the Foreign Plaintiffs to replead those claims and issues that have been dismissed  
16 without prejudice by this Court.

17 Foreign Plaintiffs' FELPSAC will not replead any manufacturing claims  
18 against TEMA. It will replead claims of design defect against TEMA for all at least  
19 Canadian and Mexican Foreign Plaintiffs and at least these vehicles manufactured by  
20 TEMA subsidiaries outside the United States.



1 DATED: April 28, 2011

2 RIBBECK LAW CHARTERED

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**PROOF OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on April 28, 2011.

/s/ Monica R. Kelly

Monica R. Kelly